

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 56

Docket No. DC-0432-10-0873-I-2

**Carmelita S. Davis,
Appellant,**

v.

**Department of Commerce,
Agency.**

July 24, 2013

Brook L. Beesley, Alameda, California, for the appellant.

Christiann M. Colpoys and Tiffany Blakey, Washington, D.C., for the
agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed her appeal with prejudice as a sanction for repeatedly ignoring or refusing to comply with the administrative judge's orders. For the following reasons, we DENY the appellant's petition for review.*

* Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

BACKGROUND

¶2 Pursuant to 5 U.S.C. chapter 43, the agency removed the appellant, a Standard Reference Materials Assistant at its National Institute of Standards and Technology, for unacceptable performance. *Davis v. Department of Commerce*, MSPB Docket No. DC-0432-10-0873-I-1 (IAF-1), Tab 6, Subtabs 4b, 4e. The appellant filed a timely Board appeal and requested a hearing. IAF-1, Tab 1.

¶3 The administrative judge initially scheduled the hearing for May 11, 2011. The agency timely filed its prehearing submissions on April 29, 2011. IAF-1, Tab 15. The appellant faxed a copy of her prehearing submissions on April 29, 2011, but did not include her proposed prehearing exhibits. *Id.*, Tab 17.

¶4 At the May 3, 2011 prehearing conference, the appellant indicated that she was raising affirmative defenses of disparate treatment discrimination based on age and race, disparate impact discrimination based on age and race, disability discrimination based on a failure to accommodate, and retaliation for protected equal employment opportunity (EEO) activity. IAF-1, Tab 18 at 5. During the conference, the appellant's representative, Brook Beesley, advised the administrative judge that, shortly before the conference had commenced, the appellant had called him and stated that she was going to the hospital because of a medical complication. *Id.* Although he was unclear as to the nature of the medical complication, the appellant's representative suggested that the appellant may be unavailable to participate at the scheduled hearing. *Id.* The administrative judge ordered Mr. Beesley to provide him with a status update regarding the appellant's medical condition as soon as possible so that he could make appropriate arrangements to postpone the hearing if necessary. *Id.*, Tab 24.

¶5 The administrative judge informed the appellant during the conference that in order to obtain a hearing on her affirmative defenses, she would need to make

review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

“nonfrivolous allegations of fact” to support the claims, and he ordered her to submit such allegations. IAF-1, Tab 18. In response, the appellant challenged the administrative judge’s authority to issue that order, and argued that it was unnecessary for her to make nonfrivolous allegations of fact in order to obtain a hearing on her affirmative defenses. *Id.*, Tabs 19, 21.

¶6 The agency moved for sanctions based on the appellant’s alleged contumacious behavior and failure to comply with several of the administrative judge’s orders. IAF-1, Tab 22. First, the agency claimed that the appellant failed to timely serve her prehearing submissions, including her exhibits, so that they were received by April 29, 2011. *Id.* at 8. The record shows that the appellant failed to honor the administrative judge’s order requiring her exhibits be received in his office by April 29, 2011; instead, she mailed the exhibits to the regional office on that date. *See id.*, Tab 14 at 2, Tab 17 at 1, Tab 18 at 14. The agency also sought sanctions for the appellant’s failure to respond to its proposed stipulations of fact. *Id.*, Tab 22 at 8; Tab 15 at 25-31. Lastly, the agency cited the appellant’s failure to comply with the administrative judge’s order that she provide nonfrivolous allegations of fact to support her affirmative defenses and that she set forth specific information regarding the proffered testimony of certain witnesses. *Id.*, Tab 22 at 8. The agency requested that the administrative judge sanction the appellant by deeming each of its proposed stipulations “admitted” and by precluding the appellant from presenting any witness testimony or other evidence concerning her affirmative defenses. *Id.* at 4.

¶7 On May 7, 2011, the appellant’s representative filed a response to the agency’s motion for sanctions and argued the “motion should be **rejected**.” IAF-1, Tab 23 (emphasis in original). In addition, he stated, “[t]o date, the appellant is unable to assist her undersigned representative due to her medical condition, in which her speech and vision has [sic] been significantly impacted, among other things, and will advise on this ongoing and serious matter.” *Id.* Based on her representative’s statement describing the appellant’s medical

condition, a Board staff member called her representative at his telephone number of record on numerous occasions and left messages instructing him to contact the administrative judge and provide a status update as previously ordered so the Board could cancel the hearing if necessary. *Id.*, Tab 24. The appellant's representative did not return the calls, nor did he provide a written status update as previously ordered by the administrative judge.

¶8 On the day before the scheduled hearing, May 10, 2011, an employee of the Board called the appellant's representative again to obtain a status update, but he did not return the call. Accordingly, the administrative judge cancelled the hearing scheduled for May 11, 2011, based on the appellant's most recent representation that she was suffering from a "serious" medical condition. IAF-1, Tab 24. In addition, the administrative judge ordered the appellant to submit appropriate medical documentation on or before May 13, 2011, to support her claim that she has been incapable of assisting her representative because of her medical complications. *Id.* The administrative judge also reminded the appellant again that she must comply with his orders and her failure to do so "may result in the imposition of **sanctions pursuant to 5 C.F.R. § 1201.43**," noting further that she was "responsible for the actions or inactions of her chosen representative." *Id.* (emphasis in original).

¶9 On May 13, 2011, the appellant's representative filed a statement indicating that the appellant "has not been able to consistently assist with her appeal due to her recent complications with her serious medical conditions." IAF-1, Tab 25. The appellant's representative also noted that, "the AJ's [administrative judge's] stated threat of sanctions in connection with [her] claimed affirmative defenses of record . . . involve an important question of law or policy." *Id.* In addition, he requested that the appeal be dismissed without prejudice to refiling so that she could "receive necessary medical care and treatment to stabilize her current condition." *Id.* In support of this request, the appellant included a declaration noting that she was going to participate in a medical study and "need[ed] to

remain strong enough to begin the clinical trial” and avoid “stress.” *Id.* She also included as a “Statement of Physician Services” for various treatments that she apparently received on February 6 and 7, 2011, and a cover sheet of a “Research Participant Informed Consent and Privacy Authorization Form.” *Id.*

¶10 The administrative judge dismissed the appeal without prejudice due to the appellant’s medical condition that made her unable to assist in her own appeal, *see* IAF-1, Tabs 25-27, and the appellant timely refiled the appeal in accordance with the administrative judge’s instructions, *id.*, Tab 26; *Davis v. Department of Commerce*, MSPB Docket No. DC-0432-10-0873-I-2 (IAF-2), Tab 1. At a September 21, 2011 status conference, the administrative judge afforded the appellant another opportunity “to comply with my May 4, 2011 order as it pertains to her affirmative defenses.” *Id.*, Tab 3 at 3. He deferred ruling on the agency’s motion for sanctions pending the appellant’s response. *Id.*

¶11 In her responses, the appellant disputed the administrative judge’s assertion that she had failed to respond to his orders regarding her affirmative defenses and again challenged his authority to require that she make a detailed statement of facts in order for her to obtain a hearing regarding her declared affirmative defenses. IAF-2, Tabs 4-5. The appellant also moved for certification of an interlocutory appeal on the issue. *Id.*, Tab 4. In an October 5, 2011 order, the administrative judge denied that motion and determined that the only material issues to be decided in the appeal were the chapter 43 removal action and the affirmative defenses of retaliation for prior EEO activity and disability discrimination based on a failure to accommodate. *Id.*, Tab 6 at 4-5. The administrative judge also granted the agency’s motion for sanctions, striking the appellant’s remaining affirmative defense claims “because she failed to comply with my repeated orders requiring that she support these claims with nonfrivolous allegations of fact.” *Id.* at 4 n.1.

¶12 The hearing was scheduled for November 2, 2011. IAF-2, Tab 3. After going on the record at the scheduled hearing time, the appellant, through her

representative, moved for reconsideration of a number of the administrative judge's prehearing rulings, including the aforementioned sanction. *Id.*, Hearing Transcript, November 2, 2011 (HT) at 3, 5-19, 24-26; *see* IAF-2, Tab 6 at 5. The administrative judge ordered the appellant to put one of those motions for reconsideration in writing and denied the others as untimely. HT at 6-7, 14, 21, 27; *see* IAF-2, Tab 10 at 1. Mr. Beesley then announced that the appellant had decided to waive her right to a hearing and first requested, then demanded, a decision on the written record. HT at 27-28. The administrative judge denied that request, telling Mr. Beesley "we are going to move forward with the hearing." *Id.* at 28. Mr. Beesley replied "[w]e're not moving forward" and he reiterated his demand for a decision on the written record. *Id.* After a short recess, the agency requested that the administrative judge sanction the appellant by dismissing the appeal with prejudice, and the administrative judge took the agency's request under advisement. *Id.* at 31, 38-41.

¶13 On November 8, 2011, the administrative judge issued an order in which he found that "the appellant acted in bad faith when she intentionally and knowingly refused to participate in her hearing," and ordered her "to show cause why the Board should not impose sanctions for her failure to comply, in bad faith, with my order" to continue with the hearing. IAF-2, Tab 10 at 4. The administrative judge also gave the parties an opportunity to file evidence and argument regarding the Board's then recently issued decision in *Smets v. Department of the Navy*, [117 M.S.P.R. 164](#) (2011), because it "appears to be particularly relevant to the facts in this case." IAF-2, Tab 15 at 1, Tab 16. Both parties responded. *Id.*, Tabs 12, 17-19.

¶14 In his initial decision, the administrative judge found that, despite his prior imposition of sanctions for the appellant's repeated refusal to comply with his orders, "the appellant continued to disregard my orders at the hearing and refused to prosecute/defend her appeal at the hearing without good cause and in bad faith." IAF-2, Tab 20, Initial Decision (ID) at 18-19. Thus, because he found

that “the appellant intentionally and knowingly refused to participate in her hearing and withdrew from the proceeding under the threat of sanctions[,]” and that a lesser sanction than dismissal with prejudice was “inappropriate given the egregious nature of the actions at issue[,]” the administrative judge dismissed the appeal with prejudice “in the interests of justice.” ID at 21-23.

¶15 In her petition for review, the appellant claims that the administrative judge abused his discretion in sanctioning her and that his substantive errors denied her “any opportunity to present her case.” Petition for Review (PFR) File, Tab 3 at 1. Also, the appellant asserts for the first time that she was “experiencing significant medical symptoms affecting her speech and vision” at the hearing. *Id.* at 3. She submits four pages of medical documents in apparent support of that assertion. *Id.* at 6-9. The appellant also provides a sworn statement describing her medical condition, both generally and at the time of the hearing. *Id.* at 10-13. The agency responds in opposition. PFR File, Tab 5.

ANALYSIS

The appellant’s medical documentation does not provide a basis for reversing the initial decision.

¶16 Initially, we note that the medical documents the appellant submits for the first time with her petition for review all date from well before the close of the record below and the appellant fails to assert that those documents were unavailable, despite her due diligence, before the record closed. *See* PFR File, Tab 3 at 6-9; [5 C.F.R. § 1201.58\(a\)](#). Under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Moreover, at the time that she declined to proceed with the hearing, as well as in her post-hearing submissions, the appellant did not claim that she was doing so on the basis of her medical condition and, as noted above, she makes

this argument for the first time on review. *See* HT; *see also* IAF-2, Tabs 9, 11, 17. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). The appellant makes no such showing.

The administrative judge did not abuse his discretion in dismissing the appeal with prejudice.

¶17 The sanction of dismissal with prejudice may be imposed if a party fails to prosecute or defend an appeal. *Williams v. U.S. Postal Service*, [116 M.S.P.R. 377](#), ¶ 7 (2011) (citing *Ahlberg v. Department of Health & Human Services*, [804 F.2d 1238](#), 1242 (Fed. Cir. 1986) and [5 C.F.R. § 1201.43\(b\)](#)). However, it is a severe sanction and only should be imposed when it is clearly warranted. Our reviewing court, the U.S. Court of Appeals for the Federal Circuit, has stated:

The [MSPB's] precedent notes that such an "extreme sanction of dismissal of an appeal for failure to prosecute should not be imposed for a single instances of failure to comply with a Board order. In the absence of bad faith or evidence that an appellant intends to abandon his appeal, dismissal for failure to prosecute is generally inappropriate." *Burnett v. Dep't of the Navy*, [71 M.S.P.R. 34](#), 38 (1996) (overturning a dismissal based on a failure to respond to timeliness portion of Acknowledgment Order)(citation omitted).

Williamson v. Merit Systems Protection Board, [334 F.3d 1058](#), 1063 (Fed. Cir. 2003).

¶18 Although the Board's regulation, [5 C.F.R. § 1201.43\(b\)](#), does not set forth guidelines for exercising this authority, the Board has held, in pertinent part, that such a severe sanction is only appropriate when necessary to serve the ends of justice and should only be imposed when: (1) a party has failed to exercise basic due diligence in complying with Board orders; or (2) a party has exhibited negligence or bad faith in its efforts to comply. *Williams*, [116 M.S.P.R. 377](#), ¶ 7. Furthermore, absent a showing of abuse of discretion, the Board will not reverse an administrative judge's imposition of sanctions. *Id.*

¶19 Here, we agree with the administrative judge's assessment that the appellant, through her representative, showed bad faith in prosecuting her appeal because she repeatedly ignored the administrative judge's orders. Furthermore, she exhibited bad faith when she pursued reconsideration of long-decided motions on the morning of the scheduled hearing and then withdrew her hearing request on the basis of the foreseeable result of this gambit. The motions involved and the appellant's decision to request a decision on the written record could and should have been made long before the parties went to the expense of preparing for and appearing at the hearing. As the administrative judge found, Mr. Beesley's tactic was "clearly designed to delay the efficient processing of [the] appeal." ID at 18-19, 21. Furthermore, as outlined above, the record shows that the appellant repeatedly failed to make good faith efforts to comply with the administrative judge's orders. IAF-1, Tabs 14, 15, 17, 18, 19, 21, 24; IAF-2 Tabs 4, 5. These clear and unambiguous orders plainly stated the time and manner of response. Accordingly, under the totality of the circumstances presented, the administrative judge's dismissal of this appeal for failure to prosecute was within his discretionary authority, and we affirm the initial decision dismissing the appeal with prejudice.

ORDER

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a

representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.